

February 28. 1760.

*His Majesty's Advocate*  
INFORMATION

*Did lands attainted revert to the*  
*Murray (James) 2nd. F O R Supr. in virtue of the Clan Act.*  
His Grace the Duke of Athol, Claimant  
upon the Estate of Perth,

AGAINST

His Majesty's Advocate.

THE Duke of Athol being Superior of certain Lands, which belonged in Property to certain of his Vassals attainted for their Accession to the Rebellion 1745, and amongst these, of the Estate of Lockgarry, the Property of Donald Macdonald of Lockgarry, and of the Lands of Tomknock and Cultranich, belonging in Property to James Drummond late of Perth, commonly called Duke of Perth, and thereafter to John Drummond his Brother, commonly called Lord John Drummond; and being advised, that the Property of these Lands did revert to him, and became consolidated with the Superiority, by the Attainder of these his Vassals, in terms of the Statute of the 1st of his late Majesty, commonly called the Clan-act, did, in pursuance of the Directions of the Vesting-act, of the 20th of his present Majesty, enter his Claim to the Property of these Lands.

It was then held to be Matter of Doubt, whether the Clan-act, made upon Occasion of the Rebellion 1715, was a temporary,  
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rary,

rary, or a perpetual Law ; and more particularly, whether it extended to Forfeitures upon Occasion of the Rebellion 1745.

This Question came first to be tried upon a Claim of the Duke of *Gordon's* ; when Judgment went in favour of the Superior ; against which his Majesty's Advocate entered an Appeal, but which is not hitherto discussed, by Reason of a Treaty between the Lords of Treasury, authorised for that special Purpose, and these Subject-superiors, Claimers of their Vassals Forfeitures : whereby it was proposed, that the Crown should make a reasonable Satisfaction to the Subject-superiors for these their Claims ; and as the Duke of *Atbol* had, amongst others, been a Party to these Communings, he considered the Matter to be in a Manner settled, and that nothing further remained to be done, but for the Subject-superiors to withdraw their Claims, upon the Composition's being settled which they were to receive.

It occurred to the Duke, that, in order to intitle him to the Benefit of the intended Compromise, it would be necessary that his Claims should be ascertained by Judgment of this Court. In this View, having insisted upon his Claim upon the Estate of *Lochgarry*, it was objected, upon the Part of his Majesty's Advocate, That all further Procedure thereon ought to stay, until the Issue of the Appeal in the Duke of *Gordon's* Case ; as the Judgment to be thereupon given would finally settle and determine that Point. And accordingly, the Lord Ordinary sisted further Procedure upon that Claim, until the Event of the Appeal with the Duke of *Gordon*.

This prevented the Duke from moving in his other Claim upon the Estate of *Perth*, as he was not disposed to throw any Obstacle in the Way of the intended Compromise taking Place, in expectation that the Appeal with the Duke of *Gordon* would either be discussed, or the Compromise with the Subject-superiors finally settled ; and therefore did not move any further for Judgment upon either of his Claims ; and was even willing to have withdrawn the same, and to have relied upon the intended Compromise, in case it should be thought, that his withdrawing the  
Claims



Claims would be of any Utility towards finishing the Compromise. But his Majesty's Advocate being seemingly of Opinion, that the Duke's Claim upon the forfeited Estate of *Perth*, was liable to such Objections, in point of Law, as would be available to cast it entirely, and consequently that the Duke, as Superior of these Lands of *Tomknock* and *Cultranich*, would not be intitled to any Consideration in respect thereof, he stated his Objections to that Claim; which, with the Answers thereto made on the Part of the Duke, are the Subject of this Report by the Lord *Shewalton* Ordinary.

The Estate of *Perth*, comprehending these Lands of *Tomknock* and *Cultranich*, had been first surveyed, as supposing it to be forfeited by the Attainder of the elder Brother *James Drummond*, commonly called *Duke of Perth*, and the Report of that Survey was dated 5th *February* 1748; it was recorded in Exchequer the 7th of *June*, published in the County of *Perth* upon the 16th, and recorded in the Sheriff-court Books upon the 17th of *June* 1748.

It was then considered to be at least a doubtful Matter, whether the Forfeiture of that Estate did accrue to the Crown, by the Attainder of *James* the elder Brother, or of *John* the younger Brother, in respect that *James* died before Expiration of the Time limited by the Act of Attainder for his Surrender; and therefore it was, that when the Duke of *Athol* came to enter his Claim upon the Clan-act, for the Property of these Lands of *Tomknock* and *Cultranich*, he claimed the same in both Views, as forfeited either by the Attainder of *James*, or of *John*, and as having thereby recognised to him, and been consolidated with his Superiority.

This Claim was duly entered upon the 6th *December* 1748, within six Months of the Registration of the above-mentioned Survey in the Sheriff-court Books of *Perth*.

It was thereafter found, by Judgment of this Court, That the Estate of *Perth* did not become forfeited to his Majesty, in and through the Attainder of the said *James Drummond*, in respect



spect that he died within the Time limited by the Act of Attainder for his Surrender.

No new Survey was taken of the Estate of *Perth*, as forfeited by the Attainder of *John*, but a *verbatim* Transcript was made of the former Survey; the Report of which is dated 24th *October* 1749; recorded in Exchequer 26th *October*; published in the County of *Perth*, and recorded in the Sheriff-court Books of that County, upon the 6th *November* 1749.

As the Duke of *Atbol* had already entered his Claim to these Lands of *Tomknock* and *Cultranich*, as forfeited by the Attainder of either of the two Brothers, he did not think it necessary to re-enter the same Claim, upon Occasion of the second Survey, believing that the Claim he had already entered answered all the Purposes of the Vesting-act, and that no Advantage could be taken of him in that Respect, if his Claim was otherwise just.

The Objections which have been offered to this Claim, on the Part of his Majesty's Advocate, are three in Number. 1<sup>st</sup>, That though the Claim was entered within six Months of the first Survey, yet as it was not renewed, subsequent to the second Survey, it ought to be rejected, as not being agreeable to the Directions of the Vesting-act of the 20th of the King, which requires all Claims to be entered within six Months after the Survey, and, in default thereof, that the Estate shall remain forfeited to his Majesty, freed, acquitted, and discharged of and from any such Claim. 2<sup>dly</sup>, That as the Estate of *Perth* had not devolved upon *John Drummond*, the younger Brother, at the Time of his Attainder, but did thereafter accrue to him, by the Death of his elder Brother *James, John*, at the Time of his Attainder, neither was nor could be Vassal to the Duke of *Atbol* in these Lands: And therefore, the Clan-act did not apply to this Case; nor could the Duke claim the Property of these Lands, as accruing to him through the Disloyalty of his Vassal; as *John*, the attainted Person, was not his Vassal in these Lands at the Time of the Attainder. 3<sup>dly</sup>, That the Clan-act, in order to prevent Collusion between Superiors and Vassals, did require, that,



that, within six Months of the Attainder, the Superior intending to claim the Benefit of his Vassal's Forfeiture, should either obtain himself in seisin in the Lands claimed, or do Diligence really, and without Collusion, for attaining Possession: That neither of these had been done in the present Case; and consequently, that, by this Neglect, the Duke had fallen from his Claim, supposing it to be in other Respects well founded.

To the *first* of these, it is answered, That the claim entered by the Duke, whereby he claimed these identical Lands, as having recognised to him, the Superior, by the Forfeiture either of *James* or *John*, who stood both attainted by the Act of the 19th of the King, conditionally, if they did not surrender within the Time limited, was properly so entered, in respect of the Doubt that then occurred, whether that Estate would be carried by the Forfeiture of the one Brother or of the other, and answered all the Ends and Purposes which the Legislature had in view, when, by the Vesting-act, all those who pretended to have any Claims upon the forfeited Estates, were appointed to enter the same within six Months after the Survey.

The Intention of the Law was just, that third Parties, innocent of the Crime, who had any Claim upon the forfeited Estates, should not be hurt or prejudged in their Interests, but that a reasonable Time should be allowed to them to enter their Claims.

It was, on the other hand, equally reasonable, that some Period should be fixed between and which the Claim should be so entered, whereby the full Extent of all the Debts and Incumbrances upon each forfeited Estate might be known and ascertained; as the Estates were to be sold, and the Price applied for Payment of the Debts, where the Extent of the Claims that should be ascertained exceeded twenty Years Purchase. Six Months after recording the Survey, was the Time limited for that Purpose; and therefore, as the Duke's Claim was entered within the six Months of the recording of the first Survey, and did claim these Lands as forfeited by the Attainder of either of

the Brothers, the Claim was, in every respect, formal and regular, and did not require to be renewed upon Occasion of the second Survey.

And, with all due Submission, it must appear a very extraordinary Objection, to avoid a Claim, if otherwise well founded, that it was entered so much sooner than the Law required. Six Months after recording the Survey was the *ultimatum*, beyond which no Claim should be competent. But there are no Words in the Act annulling or disallowing Claims entered before the recording of this Survey, providing the same were entered posterior to the Attainder, when the Forfeiture took place. The recording of the Survey was intended for a Notification to the Lieges to enter their Claims, at furthest, within six Months from that Date, and could never be meant to evacuate Claims in other respects regularly entered before that Time. And therefore it is imagined your Lordships can have little Difficulty in sustaining the Claim as duly entered, and repelling this first Objection.

To the *second* Objection, it is answered, That the declared Purpose of the Act of the 1st of his late Majesty, called *The Clan-act*, so far as respected the Crown's immediate Vassals, was to encourage them, upon Occasion of the Rebellion then on Foot, or of any after Rebellion in favour of the Pretender to the Crown of these Realms, to remain peaceable and dutiful to his Majesty, his Heirs and Successors; and, if called upon, to join in his Majesty's Host in opposition to the Rebels.

The *Premium* or Encouragement thereby given to these peaceable and loyal Subjects, the immediate Vassals of the Crown, was the Forfeiture of such Parts of the Rebels Estates as held of them the peaceable and loyal Superiors: As, on the other hand, for an Encouragement to the Sub-vassals to continue and remain in their Duty and Allegiance, they were, by the same Act, intitled to the Benefit of their Superiors Forfeitures, and to hold their Lands of the Crown, in the same Manner as they were formerly holden by the attainted Superior.

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And therefore, as the Duke of *Athol*, by his zealous Attachment to his present Majesty during the late Troubles, occasioned by the Rebellion 1745, became intitled to the Royal Favour and Bounty conferred upon the Crown's immediate Vassals, remaining dutiful and loyal, by the above-recited Act of the 1st of the late King; and as both *James Drummond*, and his Brother *John*, were notoriously engaged in the Rebellion 1745, in which they bore a principal Part; and therefore were justly attainted on that account by the Act of the 19th, though the Forfeiture did not operate as against *James*, by reason of his supervening Death between the Date of the Act and the Time thereby limited for his Surrender; yet as the Estate remained still forfeited, for the same Act of Treason in the Person of *John*, to whom it accrued by the Death of his Brother; it must appear extremely hard, and contrary to the whole Spirit and Intention of the Clan-act, if the Accident of *James's* Death was to deprive the Duke of the Benefit intended to him by his Vassal's Forfeiture, in consideration of his unshaken Loyalty and Attachment, in that Time of Danger, to his Majesty's Person and Government.

All that the Law seems to have had in view was, the Loyalty of the Superior, and the Disloyalty of the Vassal. Both these concurred in this Case in a most distinguished Manner. If the Duke of *Athol* had been so misfortunate, as to have involved himself in the Rebellion, and that the two Brothers had remained dutiful and loyal, it can admit of no Doubt, that *John* the younger Brother, upon his elder Brother's Death, would have been intitled to claim the Benefit of the Duke's Forfeiture, and to have held these Lands *in capite* of the Crown. And as the Law is reciprocal, the Duke must be equally intitled to the Benefit of that Forfeiture, arising *ex delicto* of both Brothers, *quoad* the Property of those Lands which held of him. And the Words of the Law must be so explained, as to answer what was obviously the Purpose and Intendment thereof.

The *third* Objection proceeds upon Supposition 'of the Relevancy



vancy of the Claim, and of its being duly entered; but that the Duke had fallen therefrom, by his neglecting to do something more, to obviate that Jealousy which the Law entertained of Collusion between the Subject-superiors and the forfeited Persons.

By the former Part of that Act, there were three different Classes of Persons that the Legislature had in view to encourage to remain firm in their Duty and Allegiance. 1<sup>st</sup>, The immediate Vassals of the Crown, by whose Influence and Example their Vassals and Tenants might be dissuaded from joining in the Rebellion. 2<sup>dly</sup>, The Sub-vassals, who were in hazard to be perverted from their Duty by the Influence or Example of their immediate Superiors, and who might have the like Influence over their Tenants. 3<sup>dly</sup>, The Tenants of both, who, as the Law then stood, were in a manner Slaves to their Masters, and thereby under the strongest Temptation to accompany them in their rebellious Practices.

To these three Classes different Rewards were granted, suitable to their different Circumstances. The Crown's Vassal remaining dutiful, was to have the Benefit of the Sub-vassal's Forfeiture *quoad* the Lands that held of him, and which are thereby declared "to recognise and return into the Hands of the Superior; and the Property shall be, and is hereby consolidated with the Superiority, in the same manner as if the same Lands or Tenements had been by the Vassal resigned into the Hands of the Superior *ad perpetuam remanentiam*."

The Sub-vassal was to be rewarded with the Forfeiture of the Superiority, thereby to intitle him to hold these Lands *in capite* of the Crown.

And both these Classes were thereby intitled to the Forfeiture of any Tacks, or other Title, by which the Tenants and Possessors of any Part of their Lands, convicted and attainted of High Treason, did bruik and occupy the same; which Tacks, or Title, are from thenceforth declared to cease, and become void, and the Lands themselves, so occupied and bruiked by the attainted Tenants or Tacksmen, to return to, and be enjoyed

joyed and possessed by those from or under whom such Title is derived respectively.

And, on the other hand, as an Encouragement to the Tenants not to take part with, or be misled by their disloyal Masters, such of them as remained peaceable, and in their dutiful Allegiance, are thereby ordained to bruik and occupy the several Lands, &c. by them respectively possessed, for the Space of two Years or Crops, to be accounted from and after such Attainder, freely, without Payment of any Rent, Duty, or Service.

Then follows the Clause upon which the Objection is founded, in these Words. “ And for preventing of Frauds or Collusion, in order to evade this Act, be it further enacted, by the Authority aforesaid, That if the Superior’s Vassals or Tenants to whom the Lands, Mines, &c. above mentioned are declared and ordained to belong, shall not, within six Months, to be reckoned from the Time of the Attainder of the Offenders respectively, obtain themselves infest, or do Diligence, really, and without Collusion, for attaining Possession; in every such Case the Forfeiture shall belong to his Majesty, his Heirs and Successors.”

His Majesty’s Advocate is so just as not to insinuate the least Suspicion of any actual Fraud or Collusion between the Claimant and those unhappy Brothers, his Vassals in the aforesaid Lands. But as the Statute which bestows the Reward has, from a Jealousy or Suspicion that such Fraud or Collusion might in some Instances occur, made it a Condition, that they should, within the Space of six Months, obtain themselves infest, or do Diligence, really, and without Collusion, for attaining Possession; and as neither of these was done by the Duke in the present Case; he objects, That the Duke is not intitled to take any Benefit or Advantage from the Forfeiture of his Vassal.

It will occur to your Lordships, upon the smallest Attention, that the above-recited Clause is extremely inaccurate in many Particulars, and which, in the Nature of Things, could not apply to the several Cases to which it was seemingly directed.

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And it is known to your Lordships how many Inaccuracies of the like kind, respecting the Forfeitures of Land-estates in *Scotland*, did occur in most of the Acts passed upon occasion of the Rebellion 1715, and which required so many after Acts to explain and amend the same.

A stronger Instance of this Inaccuracy cannot well be figured than what occurs in the above-recited Clause in the Act of the 1st of the King. What the Legislature had thereby in View was equitable and just, *viz.* That the Bounty of the Crown might not be perverted by Fraud and Collusion between these Donatars of the Crown and the attainted Persons, to the Use and Support of those Rebels by whose Attainder the Estate had become forfeited; and it seems then to have occurred, that the proper Criterion for removing any Suspicion of Fraud or Collusion was, that Infestment should be taken, or Diligence done for attaining Possession, within six Months.

And your Lordships will observe, that, *ex figura verborum*, this applies to all the three Ranks or Classes of Persons to whom the Benefit of these Forfeitures was granted, *viz.* the Crown's immediate Vassal, the Sub-vassal, and the Tenants, without adverting, that in many Particulars they were impracticable, from the Nature of the different Rights, and were rendered still more impracticable, by the Vesting-acts that passed upon occasion both of the Rebellions 1715 and 1745.

And to begin with the Tenants: It must be obvious to your Lordships at first View, that they neither could obtain themselves infest, because the Nature of their Right was such as not to admit of Infestment; neither were there *termini habiles* for their doing Diligence to attain Possession. They were the Tenants and natural Possessors of the Grounds: What further Possession could they attain? All that they could do was, not to pay the Rents of those two Years to which they were intitled, either to the forfeited Person, or any for his behoof. This might satisfy, that there was no Fraud or Collusion between them and the attainted Persons. But still it would not come up  
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to the Requisites of the aforesaid Clause, of obtaining themselves infeft, or doing Diligence to attain Possession : So that, according to this Construction, the Condition annexed to the Grant must have evacuated the same totally *quoad* the Tenants ; because it was in Nature impossible for them, either to obtain themselves infeft, or to do Diligence for attaining Possession. This can never be supposed to have been the Intention of the Law ; which therefore must receive this more equitable Construction, that these Proofs, to avoid the Suspicion of any Fraud or Collusion, should only be necessary where the Nature of the Right was such as to admit the one or the other ; and that neither of them could apply to the Case of Tenants, though they are equally comprehended in the Words of this Clause, is undeniable.

The same Observations apply to the Case of the Crown's immediate Vassals intitled to the Benefit of the Sub-vassals Forfeiture, as to the Property of the Lands. The Property of these Lands were, by the former Clause, declared to have recognised to the Superior *ipso jure*, and is thereby declared to be consolidated with the Superiority, in the same manner as if they had been resigned by the Vassal in the Superior's Hands *ad perpetuam remanentiam*.

By the Feudal Law of *Scotland*, and the Nature of our Land-rights, there are not *termini habiles* for Infeftment in the Person of the Superior, when Lands either recognise, or are resigned *ad perpetuam remanentiam*. His original Infeftment in the Lands stands entire, notwithstanding of the subaltern Right granted to the Vassal. He retains the *dominium directum* ; the Vassal's Right is but a Burden upon his Superiorage ; and therefore there can be no Renewal of the Infeftment in the Person of the Superior upon the Vassal's Recognition or Resignation *ad remanentiam* ; it becomes *ipso facto* extinguished or consolidated with the Superiority. And accordingly, by the former Clause of this Statute, the Sub-vassal's Right is declared to have recognised, and to be consolidated with the Superiority, in the same

Manner as if Resignation had been made *ad perpetuam remanentiam*. And thus far it is equally plain, that the above-recited Clause, so far as it requires Infestment, to avoid the Suspicion of Collusion, cannot apply to the Case of Superiors.

But then it is said, That the other Alternative was undoubtedly competent, *viz.* That he might have done Diligence, really, and without Collusion, for attaining Possession.

But the Claimant is advised, and submits it to your Lordships, that neither was this practicable with respect to the Forfeitures that occurred, either upon Occasion of the Rebellions 1715 or 1745; because, by the Vesting-acts respecting both these Rebellions, and the Forfeitures from thence arising, the forfeited Estates were declared to have vested in the Sovereign from an antecedent Period, and the King to be in the real and actual Possession of all and singular the forfeited Estates. The whole Leiges were thereby prohibited from intermeddling with those Rents; the Commissioners of the forfeited Estates in the one Case, and the Barons of the Court of Exchequer in the other, were directed to appoint Factors for levying these; and all Proceedings before the ordinary Courts of Law, whereby the levying of these Rents might be stopped by Suspension, Sequestration, or otherwise, were prohibited and discharged.

Every forfeited Estate therefore was, *prima facie*, vested in the Sovereign, adjudged and declared to be in the real and actual Possession. The Right granted to the Subject-superior did not operate *ipso jure*. He was thereby only constituted the Crown's Donatar; as such he behoved to make his Claim in one or other of the Ways enjoined by the Statutes in that Behalf made: So that till his Claim was allowed of, and affirmed, he had no such Right as could intitle him to maintain any Action for attaining the Possession *really*. So that it was a manifest Inaccuracy in the above-recited Clause, if meant to be applied to the Case of Superiors, where it required them either to take Infestment, or to do Diligence for attaining Possession, *really*, and without Collusion.

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And if it could be supposed, that the above-recited Clause in the Act of the 1st of the late King, had been intended to comprehend the Case of the Subject-superiors in either of the Particulars above mentioned, as the first was plainly impracticable in the Nature of Things, the other was rendered so by the Vesting-acts, whereby the whole forfeited Estates were, in the *first* place, vested in the King, who was thereby declared to be in the real and actual Possession, and all others debarred from intermeddling therewith, or with the Rents and Profits of the same, either *via facti* or *juris*: So that, until they were taken out of the King's Person by a Judgment or Decree upon the Claim of the Subject-superior, as the Crown's Donatar, his Hands were tied up, by these posterior Statutes, from taking any one Step that could be available to attain the Possession really. The Claimant did therefore all that he could, or that by Law was competent for him to do, when he entered his Claim within the Time limited for that special Purpose; as the Estate itself had been laid hold off by the Factors appointed by the Barons of Exchequer. And as under these Circumstances it will be puzzling to say, what Diligence the Claimant could possibly have done to attain Possession *really*, it is, with Submission, impossible that his Neglect to do what he was disabled from doing, should import a Forfeiture of his Right, when, by the Vesting-acts, a different Method was prescribed for having these Claims ascertained and made effectual.

By the aforesaid Clause, the Legislature seems to have had principally in view the Case of the Sub-vassals, who, as coming in place of the forfeited Superiors, were intitled to obtain a new Infeftment from the Barons of Exchequer; who were thereby specially authorised, upon Production of any such Attainder (of the Crown's immediate Vassal), to revise, and pass Signatures, without any Composition, in favour of the Vassal, to be holden of his Majesty, with Clauses of *Novodamus*, &c.

It might also apply to the Case, both of the Vassals and Sub-vassals, in so far as thereby intitled to their Tenants Forfeitures  
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of the Tacks of their respective Lands, whereby they were severally intitled to have resumed the Possession as if no such Tacks had ever been granted.

But be that as it will, it seems extremely plain, that it could never apply to the Case of Superiors, who could neither be infeft upon their Vassal's Forfeiture, nor could really attain Possession by any Method known in the Law consistent with the other Statutes passed upon Occasion of these Rebellions, vesting the whole Estates, *prima instantia*, in the Crown, thereby declared to be in the real and actual Possession thereof, interpellung all others from intermeddling therewith, and establishing a Rule, whereby every Claim of or concerning these Estates should be made effectual.

*In respect whereof, &c.*

ALEX. LOCKHART.

